Supreme Court, U.S.
FILED
DEC 30 1999
CLERK

(2)

No. 99-938

IN THE
SUPREME COURT OF THE UNITED STATES

BILL MORROW, BARRY KEENE,
and BRUCE HENDERSON,

Petitioners,

v.

THE STATE BAR OF CALIFORNIA,
And MEL ASSAGAI,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mark W. Danis (Bar No. 147948)
Morrison & Foerster
12636 High Bluff Drive, Ste. 300
San Diego, CA 92130-2071
Telephone: (858) 720-5100
Facsimile: (858) 720-5125

Marie M. Moffat (Bar No. 62167)
Lawrence C. Yee (Bar No. 84208)
Dina E. Goldman (Bar No. 142601)
Office of General Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2270
Facsimile: (415) 538-2321

Counsel for Respondents

ZIPP

TABLE OF CONTENTS

		Pages
I.	*Lathrop, Keller* and Related Cases Are Dispositive of Petitioner's Alleged Freedom of Association Claim	1
II.	Petitioners Cannot Establish That They Are Forcibly Associated With Legislative Positions Taken By The State Bar	11
III.	This Case Should Not Be Held In Abeyance Pending This Court's Decision in *Board of Regents of the University of Wisconsin* v. *Southworth.*	15
IV	Conclusion	16

TABLE OF AUTHORITIES

Pages

Cases

Abood v. Detroit Board of Education, 431 U.S. 209, 978 S.Ct. 1782, 51 L.Ed.2d 261 (1977) 8-9

Board of Regents of the University of Wisconsin System v. *Southworth*, 119 S.Ct. 1332 (1999) 16

Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 117 S.Ct. 2130, 128 L.Ed.2d 585 (1997) 7,8

Kaimowitz v. The Florida Bar, 996 F.2d 1151 (11th Cir. 1993) 9

Keller v. State Bar of California, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) 1,6,7,9

Lathrop v. Donohue, 367 U.S. 820, 81 S.Ct. 2228, 6 L.Ed. 1191 (1961) 2,,4,6,11,13

Morrow v. State Bar of California, 188 F.3d 1174 (9th Cir. 1999) 1

Pacific Gas & Electric Company v. Public Utility Commission of California, 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) 13,14

Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) 7,11

West Virginia Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) 7

Wooley v. Maynard, 430 U.S. 705 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) 7

Respondents the State Bar of California and Mel Assagai[1] respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 188 F.3d 1174 (9th Cir. 1999).

I. *Lathrop*, *Keller* and Related Cases Are Dispositive of Petitioners' Alleged Freedom of Association Claim.

Pursuant to this Court's decision in *Keller* v. *State Bar of California*, 496 U.S. 1, 110 S. Ct. 2228, 110 L.Ed.2d 1 (1990), the State Bar cannot use bar dues paid by Petitioners for political or ideological legislative or other speech activities that are unrelated to the Bar's interest in regulating the legal profession or improving the quality of legal services. Petitioners make

---

[1] Assagai was the State Bar's former Senior Executive for Governmental Affairs, who was retained under an independent contractor agreement as lobbyist when this action was filed. (Petition for Writ of Certiorari, App. C, 21a.) That contract expired in January 1999.

clear that they do not challenge any such expenditure of their dues, but rather allege that their constitutional right to freedom of association is violated because they are forced to belong to an organization that takes positions on legislative bills with which they disagree. (Petition for Writ of Certiorari ("Petition"), 6.) Consistent with this Court's decisions in *Keller* and *Lathrop*, the Ninth Circuit properly held that membership enrollment alone, without any other aspect of governmental compulsion, burden or restraint, does not present any valid claim of First Amendment infringement.

In *Lathrop* v. *Donohue*, 367 U.S. 820, 81 S.Ct. 2228, 6 L.Ed. 1191 (1961) this Court held that a lawyer's right to freedom of association is not violated where his required membership in the bar imposes no conditions other than the requirement to pay dues. *Lathrop*, 367 U.S. at 843. Petitioners deny the impact that *Lathrop* has on their case by misstating the Court's

decision, claiming that *Lathrop* has no holding beyond the decision of a plurality of the Court that no constitutional question was properly before them. (Petition, 13-15.) As correctly noted by the Ninth Circuit and the District Court below, Petitioners' contention is incorrect. As a fair reading of *Lathrop* clearly reveals, the Court considered two constitutional questions, ruling on only one of them. The *Lathrop* appeal was from a judgment in which:

> The [Wisconsin] Supreme Court held that the requirement that appellant be an enrolled dues-paying member of the State Bar did not abridge his *rights of freedom of association*, and also that his *rights to free speech* were not violated because the State Bar used his money to support legislation with which he disagreed.

Lathrop, 367 U.S. at 823 (emphasis added). Thus, in *Lathrop*, the Court considered two questions: 1) did compulsory membership in the State Bar abridge Lathrop's freedom of association; and 2) did the State Bar's use of mandatory dues for lobbying of legislation with which Lathrop disagreed violate his freedom of speech?

On the first question, whether Lathrop's right to freedom of association was abridged, the Court clearly did rule. Finding no "impingement upon protected rights of association, four members of the Court framed the issue in terms identical to that presented by Petitioners' claim:

> The core of appellant's argument is that he cannot constitutionally be compelled to join and give support to an organization which has among its functions the expression of opinion on

legislative matters and which utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation. But *his compulsory enrollment imposes only the duty to pay dues.* The Supreme Court of Wisconsin so interpreted its order and its interpretation is of course binding on us. The court said: "The rules and by-laws of the State Bar, as approved by this court, *do not compel the plaintiff to associate with anyone. He is free to attend or not to attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year."* We therefore are

> confronted, as we were in Railway Employees' Department v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), only with a question of *compelled financial support of group activities, not with involuntary membership in any other aspect.*

Lathrop, at 827-828 (footnotes and citations omitted) (emphasis added). Two additional members of the Court concurred that compelled Bar membership did not infringe the plaintiff's freedom of association. So, as noted in *Keller*, six members of the Court in *Lathrop* rejected the freedom of association claim. *Keller*, 496 U.S. at 7, 8. The *Lathrop* court did not rule on the second question before it, whether the plaintiff's freedom of speech rights were violated by the forced expenditure of money on support of legislative positions with which he disagreed. *Lathrop*, at 845; *Keller*, at 9.

The holding in *Lathrop* controls Petitioners' alleged freedom of association claim. The fact that the State Bar may engage in legislative activity or that some of its legislative positions may have an ideological tinge, *Keller* at 9, is immaterial when there are no complaints about compelled financial contributions to fund this activity. Government actions implicate freedoms of speech and association only if there are some aspects of the action that compel, burden, or restrain activities protected by the First Amendment. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622-23, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *see Glickman* v. *Wileman Bros. & Elliot*, 521 U.S. 457, 469-71, 117 S.Ct. 2130, 2138, 2139, 128 L.Ed.2d 585 (1997). The cases cited by Petitioners, *Wooley* v. *Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) and *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) involve such constitutionally

prohibited compulsion of speech. *Wooley* concerned a state law which required car owners to carry the state's motto, "Live Free or Die" on their car license plates. *Barnette* involved a school board's resolution to require students to stand for the pledge of allegiance. However, in this case, Petitioners allege no compulsion beyond payment of membership fees (to which they do not complain). As this Court noted in *Glickman*, 521 U.S. at 469 n. 13, the absence of compulsion to engage in speech distinguishes *Wooley* and *Barnette*. And, as *Lathrop* held, where there is no compulsion beyond payment of dues, there is no cognizable freedom of association claim.[2]

---

[2] When Petitioners complain about forced membership in the State Bar of California because it engages in political activity with which they disagree, they are really objecting to and seeking to enjoin activities paid for by *non-objecting* members. As the Supreme Court decision in *Abood*, provides, Petitioners have no such claim for relief. *Abood* v.

The Ninth Circuit's holding in this case is consistent with that of the Eleventh Circuit. Applying *Lathrop*, the Eleventh Circuit considered and rejected a claim identical to that raised by Petitioners. The Eleventh Circuit adopted the district court's memorandum opinion and affirmed the lower court's judgment. The Eleventh Circuit found that the Florida bar had adopted refund procedures that satisfied the requirements of *Keller* and *Hudson* and, finding that the plaintiff did not object to the amount of the refund, held that there was no valid constitutional challenge to his payment of bar dues. *Kaimowitz* v. *The Florida Bar*, 996 F.2d 1151, 1154 (11th Cir. 1993). Noting that plaintiff, a lawyer seeking to "disassociate himself from

---

Detroit Board of Education, 431 U.S. 209, 235-236, 239 n. 4, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Keller*, 496 U.S. at 9.

the Florida bar" was asserting a freedom of association claim not involving the compulsory payment of bar dues, the Eleventh Circuit held that the reasoning in *Lathrop* would control.

> Plaintiff also asserts in the complaint that his compelled association with the Florida bar violates his First Amendment right to freedom of association. . . . [*Keller*] dealt only with compulsory payment of bar dues, not with the constitutionality of compulsory membership in and of itself. That issue was decided by the Supreme Court in 1961, in a decision on which the *Keller* court relied heavily. . . . The *Lathrop* decision controls Plaintiff's claim regarding compulsory bar membership, and the Defendants' motion [for

summary judgment] is due to be granted

on that claim as well.

Id., at 1154.

II Petitioners Cannot Establish That They Are Forcibly Associated With Legislative Positions Taken By The State Bar.

Petitioners assert that, because they must belong to the State Bar to practice law, they are "thus *forced* to be associated with respondent Bar's speech." (Petition, 20.) However, when the organization at issue has hundreds of thousands of members, it is most unlikely that a member of the general public would attribute a legislative position taken by the State Bar to one of its individual members. Such a large and unselective group is not an intimate association. *Roberts* v. *United States Jaycees*, 469 U.S. at 621. Large and unselective associations simply do not possess the shared community of thoughts, experiences, and beliefs of intimate associations. *Id.*, at 620. As Justice Harlan

said in his concurring opinion in *Lathrop*,

> [T]he State Bar's purpose of furthering expression of views is unconnected with any desire to induce belief or conviction by the device of forcing a person to identify himself with the expression of such view. True, purpose may not be controlling when the identification is *intimate* between the person who wishes to remain silent and the beliefs foisted upon him. ***But no such situation exists here where the connection between the payment of an individual's dues and the views to which he objects is factually so remote. Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that "everyone understands or should***

understand" that the views expressed are those "of the State Bar as an entity separate and distinct from each individual."

Lathrop, 367 U.S., 859 (Citation omitted) (Emphasis added).

The district court below also properly concluded that the legislative positions of the State Bar are unlikely to be attributed to its individual members. "[C]ompulsory membership alone does not establish the connection because it is not likely that the State Bar's position on political issues is attributed to each of its 159,000 members." (Petition, App. B, 16a.)

Petitioners' reliance on *Pacific Gas & Electric Company* v. *Public Utility Commission of California*, 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) to support their argument is misplaced. In *Pacific Gas*, this Court struck down a regulation that forced a

privately-owned utility to include with the mailing of its monthly bills to its customers an editorial newsletter published by a consumer group which was strongly critical of the utility's rate making practices. *Id.*, at 13, 15. In a plurality opinion, the Court stated that in order to avoid the appearance that it agreed with the group's views, the utility would "feel compelled to respond to arguments and allegations made by the [group] in its messages." *Id.*, at 16.

Unlike the facts of *Pacific Gas*, Petitioners in this case are not required to advocate any position whatsoever, much less display messages or disseminate views on behalf of the State Bar. Indeed, the only "displayed" message about which Petitioners complained below was the court rule requirement that lawyers demonstrate their admission to practice law by including their State Bar number in all pleadings. How placing their bar number on court pleadings would

necessarily associate Petitioners with legislative positions taken by the State Bar is not clear. As the district court stated: "the requirement of identifying one's bar membership in documents filed with courts can hardly be considered an endorsement of the State Bar's political positions. (Petition, App. B, 16a.)

III This Case Should Not Be Held In Abeyance Pending This Court's Decision in *Board of Regents of the University of Wisconsin* v. *Southworth.*

Since Petitioners do not challenge their payment of mandatory State Bar membership fees, their request that this Court hold this case pending a decision in *Board of Regents of the University of Wisconsin v. Southworth* should be disregarded. The petition for writ of certiorari in *Southworth* was granted limited to the following question: "[w]hether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are

used in part to support organizations that engage in political speech." *Board of Regents of the University of Wisconsin System* v. *Southworth*, 119 S.Ct. 1332-1333 (1999). Petitioners raise a distinct First Amendment challenge based on compelled membership in the State Bar of California. Thus, there is no reason for this Court to hold this case pending its decision in *Southworth*.

IV Conclusion

This case presents no important unsettled federal question warranting review by this Court. Rather, the issue is one long resolved by this Court's analysis in *Lathrop*. The Ninth Circuit opinion below correctly applied *Lathrop*. The Ninth Circuit's analysis is consistent with the Eleventh Circuit's earlier decision in *Kaimowitz* and therefore presents no conflict in the circuits. Accordingly, for this and all the reasons stated

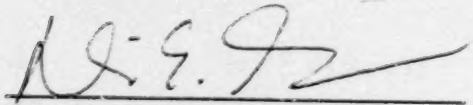
above, the petition for writ of certiorari should be denied.

Dated: December 30, 1999

Respectfully submitted,

Mark W. Danis

Marie M. Moffat
Lawrence C. Yee
Dina E. Goldman



Dina E. Goldman

Attorneys for Respondents

DECLARATION OF SERVICE BY MAIL

I, Joan Sundt, declare as follows: I am a citizen of the United States and a resident of the City and County of San Francisco, that my business address is The State Bar of California, 180 Howard Street, San Francisco, California 94105

On December 30, 1999, following ordinary business practice, I placed for collection and mailing at the offices of the State Bar of California, 180 Howard Street, San Francisco, California 94105, three copies of Respondents' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, addressed to counsel for petitioner as follows:

Paul N. Halvonik	Fred J. Heistand
2600 Tenth Street	1121 L Street
Suite 511	Suite 404
Berkeley, CA 94710	Sacramento, CA 95814

I am readily familiar with the State Bar of California's practice for collection and processing correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the U.S. Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California this 30th day of December, 1999.

